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NO. 31645-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

PHILLIP VICTOR HICKS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Thomas Felnagle, Judge
The Honorable Brian Tollefson, Judge

OPENING BRIEF OF APPELLANT

Rita J. Griffith
Attorney for Appellant

1305 N.E. 45th Street, #205
Seattle, WA 98105-45232
(206) 547-1742

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RULES, STATUTES AND OTHERS

A. ASSIGNMENTS OF ERROR

1. The trial court erred, during the first trial, in instructing the jury during voir dire that the case was not a death penalty case.

2. Mr. Hicks was denied the effective assistance of counsel if his attorney failed to object to the trial court's instruction that the case was not a death penalty case.

3. The trial court erred in denying Mr. Hicks' motion to suppress his custodial statements.

4. Mr. Hicks assigns error to undisputed fact no.17 of the trial court's Findings of Fact and Conclusions of Law Admissibility of Statement, CrR 3.5, and conclusions as to disputed facts nos. 2, 4, 5, 6, 13.[1]

5. Mr. Hicks assigns error to conclusions as to admissibility nos. 1, 2, 3 and 4 of the trial court's Findings of Fact and Conclusions of Law Admissibility of Statement, CrR 3.5

6. The trial court erred in denying Mr. Hicks' Batson challenge which arose during voir dire at the second trial.

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[1] The written findings of fact and conclusions of law are attached to this brief and incorportated here by reference. CP 10-20.

7. The trial court erred in admitting hearsay evidence that jail medical staff treat inmates with antipsychotic medication just to control their behavior.

8. The trial court erred in failing to excuse a juror who was contacted by friend of the complaining witness.

9. The trial court erred in allowing the state to use prior recorded cross examination of an unavailable witness over defense objection.

10. Cumulative error denied Mr. Hicks a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Mr. Hicks denied his state and federal constitutional rights to an impartial jury, which was not unfairly influenced by the trial court's instruction that the case was not a death penalty case?

2. Was Mr. Hicks denied the effective assistance of counsel, guaranteed by the state and federal constitutions, where counsel may have failed to object to the trial court's instruction that the case was not a death case.

3. Did the trial court err, in violation of the state and federal constitutions, in denying Mr. Hicks' motion to suppress his custodial statements where the three homicide detectives who took him into their custody engaged in tactics which were the functional equivalent of

interrogtion without giving him his Miradna warnings; they went to the scene of his drug arrest, placed him in their unmarked car and drove him away knowing that these unusual circumstances would cause Mr. Hicks to try to clarify what was happening and why it was happening?

4. Were the subsequent Miranda warnings ineffective?

5. Was Mr. Hicks denied his state and federal constitutional rights where Detective Webb asked him a further question without obtaining a waiver after Mr. Hicks had invoked his right to counsel and right to remain silent?

6. Did the trial court deny Mr. Hicks his state and federal constitutional rights to equal protection where the trial court denied his Batson challenge without undertaking the required analysis and where the prosecutor's reasons for excusing the only remaining African-American on the panel were pretexual reasons?

7. Did the trial court err in admitting hearsay statements made by an unidentified jail medical staff person where there was no appropriate hearsay exception?

8. Did the trial court err in admitting the hearsay statement of a person on the jail medical staff, in violation of Mr. Hicks' state and federal confrontation rights, where the hearsay was testimonial?

9. Did the trial court err, in violation of Mr. Hicks' state and federal constitutional rights, in failing to excuse a juror who was contacted outside the courthouse by a friend of the victim's?

10. Did the trial court err in allowing the state to introduce unreliable former testimony of an unavailable witness, in violation of Mr. Hicks' state and federal constitutional rights to due process of law?

11. Did cumulative error deny Mr. Hicks a fair trial?

C. STATEMENT OF THE CASE

1. Procedural history

The Pierce County Prosecutor's Office charged Philip Hicks, together with codefendant Rashad Babbs, by corrected amended information, alternatively, with either the aggravated murder of or the felony murder of Chica Webber (Count I); with the attempted first degree murder of Jonathan Webber (Count II) and with the unlawful possession of a firearm (Count III). CP 81-84.

A jury convicted Mr. Hicks of the alternative of felony murder on Count I and of unlawful possession of a firearm on Count III, but was unable to reach a unanimous verdict on Count II, after trial before the Honorable Thomas Felnagle. CP 85, 86, 89, 90, 92; RP(5/14) 10-16, 20-

21.[2] A subsequent jury convicted Mr. Hicks of attempted first degree murder on Count II after trial before the Honorable Brian Tollefson. CP 95-96.

On April 12, 2004, Judge Felnagle imposed judgement and sentence on all counts, sentencing Mr. Hicks to terms within the standard range. CP 133-134. Mr. Hicks filed a timely notice of appeal challenging his convictions. CP 132.

2. Voir dire for the first trial

During voir dire at the first trial, a prospective juror indicated concern that his beliefs as a Catholic on matters such as contraceptives, abortions, and capital punishment might conflict with his jury service. RP(4/22) 73-74. After an unreported sidebar, the court indicated in front of the entire jury panel that

> I wanted to let all of you know with regard to this particular case, you heard me say it's an aggravated murder in the first degree case. This is not a death penalty case. So that is one that I suppose could come in conflict with your religious beliefs, but it is not one that is at issue in this case.

RP(4/22) 74

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[2] The verbatim report of proceedings of the second trial is in multiple volumes, but sequentially numbered. These transcripts are designated RP. The remainder of the transcripts are designated by hearing date, e.g. RP(5/29) for the hearing of May 29, 2003.

3. Trial facts

Shortly before midnight on March 22, 2001, Jonathan and Chica Webber, a married couple, were walking from a friend's house to Jonathan Webber's mother's house in the Hilltop area of Tacoma, Washington.[3] RP 1164-1166. Jonathan had been released from jail earlier in the evening. RP 1165. The Webbers were approached by two young men who asked about "work" or drugs. RP 1167. The Webbers kept walking. RP 1171. When asked what set he was from, Jonathan Webber replied that he was too old for such boy stuff. RP 1172. The two men, or one of them, told the Webbers to empty their pockets or someone was going to die. RP 1174. As the Webbers continued walking across the intersection at 15th and Sheridan, they were shot. RP(4/23) 108-113; RP 1176-1177. Chica Webber fell to the ground and was pronounced dead at the scene. RP(4/23) 115. RP 1177. Jonathan, who survived, was wounded in the thigh, lower abdomen and chest. RP 1178; RP(4/25) 8, 27.

The two assailants ran away through an alley. RP 529, 1178. A man who lived nearby reported hearing a larger-caliber gun fire first, followed by shots from a smaller caliber gun. RP(4/23) 91-97. Four 9 mm shells were found at the scene. RP(4/24) 106-1071; RP(5/1) 102-107;

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[3] Jonathan Webber testified at the second trial, but not at the first trial.

RP(5/1) 54; RP 541, 636. Jonathan Webber's wounds were "through and through" wounds and the only bullet fragments which remained in his body were not removed by the physicians who treated him. RP(4/23) 8, 11; RP 866, 868-871. Chica Webber had been shot three times in the head; twice by a .22 caliber gun and once by a 9 mm. bullet. RP(5/5) 54-57; RP 912-923, 1004. Either the angle of the gun, the angle of the head, or both had to have changed between the first and second shots from the .22 caliber weapon to result in the trajectories of the bullets determined during the autopsy. RP(5/5) 82. The medical examimer could not tell the order in which the injuries were inflicted. RP 917.

The police arrived at the scene very quickly after the shooting and a police K-9 unit tracked the assailants. RP 524-528, 639, 1179. The dog did not lead to any person, but located a .22 caliber revolver, a brown glove, a black leather jacket, a knit hat, and a blue sweatshirt at various points along the track he followed. RP(4/24) 38-42, 45-47, 49, 51, 165-198; RP 546-579, 684-691, 742-759.

Phillip Hicks was arrested on unrelated charges approximately one month after the shooting and made a statement to the police implicating himself in the shooting and the possession of the .22 caliber gun, although he denied shooting and at one point claimed that he shot under duress.

Mr. Hicks' trial defense was diminished capacity. Mr. Hicks was not tied to the crime by any physical evidence. His foster mother and her son testified that Mr. Hicks had come to the house crying in the early morning on March 232, 2001, and asked his foster mother to pray for him. RP(4/25) 42-43, 59, 81, RP 845, 1501-1504.

The trial issue for Rashad Babbs was whether he was the second assailant. The state's circumstantial case against Babbs was based primarily on evidence from Mr. Hicks' foster mother that she had seen Babbs with Mr. Hicks earlier in the day, evidence that Babbs' sister's key ring was in the pocket of the leather jacket recovered by the K-9 unit, and evidence that Babb's DNA matched the DNA on a sweatshirt recovered by the K-9 unit. RP(4/25) 35-339; RP(5/6) 18-20, 23; RP(5/6) 105, 1120-123, 142-143; RP 1442-1443; 1492-1497, 1506, 1583-1585. Babbs elicited testimony on cross examination that the state could have, but did not, perform gunpowder residue testing on the leather jacket to see if the person who had been wearing it fired a gun. RP 1044, 1028-1064. Jonathan Webber was unable to identify Babbs in a montage and actually identified someone else as looking most like the person who shot at him, even though he told officers at the hospital that he could identify his assailants. RP(5/6) 85; RP(57) 174-175, 183-186; RP 1531-1532; 1864-1865, 1881-1884.

Dr. David Moore, board certified psychologist and chemical dependency professional and Associate Director of the Center for the Study and Teaching of At-Risk Students at the University of Washington, reviewed a voluminous social history for Mr. Hicks, interviewed Mr. Hicks and performed objective testing on Mr. Hicks before rendering his opinion that Mr. Hicks lacked the capacity to process reality and act intentionally at the time of the shooting.[4] RP(5/7) 24, 28-36, 79-80; RP 1241-1253, 1303, 1429. Dr. Moore concluded to a reasonable medical certainty, based on Mr. Hick's unique cognitive, emotional, volitional and historic patterns, that he was suffering from a mental disease or defect which affected his ability to meaningfully reflect on events and form the intent to murder. RP 1408-1409, 1429.

Mr. Hicks' mental problems began with his in utero exposure to marijuana, cocaine and alcohol from his drug-addicted, prostitute mother. RP(5/7) 37; RP 1253-1256. Mr. Hicks suffered from Intermittent Explosive Disorder, likely as a result of the in utero exposure to cocaine. RP(5/7) 37; RP 1257. He therefore had an inflamed neurochemical system

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[4] Throughout the course of the trial, both of Mr. Hicks' trial attorneys and the trial court expressed concern about his mental health. See e.g., RP(4/4) 9-12; RP(4/21) 114; RP(4/22) 12-16, 2; RP(4/25) 94; RP(1/26) 7-9. Defense counsel for the first trial repeatedly ask the court to order that Mr. Hicks be forced to take medication. RP(4/4) 12; RP(4/21) 114; RP(4/22) 23-241 RP(4/25) 94. See also CP 21, 22-23.

deficient in the neurochemicals, such as dopamine and endorphin, which sedate most people during their waking hours. RP(5/7) 37-38. Mr. Hicks had been diagnosed with Intermittent Explosive Disorder by others at various times in the past, in addition to Dr. Moore's diagnosis. RP(5/7) 39. Dr. Moore described Intermitted Explosive Disorder as similar to having a huge dose of fight or flight response. RP(5/7) 39-40.

Additionally, Mr. Hicks had a long-standing diagnosis of Attention Deficit Hyperactive Disorder. RP(5/7)42; RP 1257. These diagnoses were accompanied by a general anxiety disorder arising from environmental factors. RP(5/7) 72l; RP 1261-1263. Mr. Hicks' father left his mother during the early years of his life and his mother was incapable of providing the necessities of life for him. RP(5/7) 44-45; RP 1263. His uncle, who lived with Mr. Hicks' mother, sexually abused him at an early age. RP(5/7) 48. Although CPS intervened and placed Mr. Hicks in a foster home and school where he was able to make improvement, he was returned to his mother when he was 10 years old. RP(5/7) 48-53; RP 1263-1267. His mother was unable to remain in treatment, and Mr. Hicks was placed in foster care in the Hilltop area in Tacoma where he was exposed to gang violence, poverty and drugs. RP(5/7) 53-56, 60; RP 1267, 1272. All of these factors exacerbated his other vulnerabilities. RP(5/7) 60. He self-medicated with marijuana and, by the time he was in the juvenile justice

system, he was chemically dependent. RP(5/7) 60-65; RP 1270, 1278, 1295.

Mr. Hicks was prescribed Seroquel while in the Department of Corrections, a drug which is appropriate only to treat schizophrenia and psychosis. Mr. Hicks was still being prescribed Seroquel by jail staff pending trial. RP(5/7) 69-70; RP 1286-1287.

At the second trial, Mr. Hicks' foster brother who had grown up along with Mr. Hicks testified that he had observed strange and bizarre behavior from Mr. Hicks from time to time, and that when Mr. Hicks was not taking his medicine he did not make sense and had trouble interpreting things accurately. RP 848-850.

The state presented the testimony of Dr. Ronald Hart, who had two unsuccessful interviews with Mr. Hicks at Western State Hospital. RP(5/8) 20, 43-58, RP 1946, 1949-1954. Although Dr. Hart concluded that Mr. Hicks was malingering, he unambiguously testified that he did not assess Mr. Hicks' mental state at the time of the incident and was not giving an opinion about his mental state then. RP(5/8) 48, 58, 76, 100; RP 1953, 1963, 1972. Dr. Hart agreed, as well, that Dr. Moore was in a better position to diagnosis Mr. Hicks. RP(5/8) 120.

At the second trial, Mr. Hicks presented testimony from the assistant principal in charge of discipline when Mr. Hicks was in the 6th grade and

who saw him on a daily basis at that time. RP 1816. She confirmed that he was on medication for hyperactivity and if he came to school without his medication he had to be sent home. RP 1818. The assistant principal offered her opinion that in thirty years of education, Mr. Hicks was the most impulsive child she had ever seen. RP 1817. She reported an instance in which he ran out of her office and began throwing rocks at the window merely because she was going to call his mother. RP 1823, 1825. A school social worker who had worked with Mr. Hicks for over two years confirmed that he was taking medication for Attention Deficit Hyperactive Disorder at the time she worked with him. RP 1829-1833. Mr. Hicks's elementary school principal during kindergarten and first grade confirmed the absence of anyone to take care of his basic needs and that his parents were totally unresponsive to her attempts to contact or work with them. RP 1856-1860.

A former friend testified, at the second trial, that when Mr. Hicks lived with her three years earlier he heard voices and talked to himself. RP 1849-1851, 1854. As a person who worked in the mental health profession and the sister of a person who was a paranoid schizophrenic, she was concerned about Mr. Hicks. RP 1853.

At the first trial Dr. Hart testified, non-responsively during cross examination, that he had had numerous conversations with Dr. Sindorff

at the Pierce County Jail about the fact that they prescribe psychotropic medications for behavioral control. RP(5/8) 110. At the second trial, the defense objected on hearsay, relevance and foundational grounds when the state sought to elicit from Dr. Hart that the Pierce County Jail prescribed antipsychotic mediation purely for the purpose of behavioral control. RP 2026-2027. The court overruled the objection. RP 2026-2027.

4. Closing argument

In closing argument, the prosecutor argued that Dr Hart said

> I've had numerous conversations with the Pierce County Jail about their desire to put people on Seroquel to control their behavior.
>
> So there has been no evidence whatsoever, anywhere in this trial, that Defendant Phillip Hicks was diagnosed as having pyschotic espisodes, that he has the inability to form intent, None. The closest that they can come is, the jail has him on Seroquel, and the pharmacies say that's used to treat psychosis. But, that's not what Dr. Hart says.

RP(5/12) 163.

In closing argument during the second trial, the prosecutor repeated that jails give antipsychotic medication to inmates to control their behavior. RP 2181.

5. Mr. Hicks' statements and the 3.5 hearing

Detectives William Webb, John Ringer and Tom Davidson testified as the state's witnesses at the CrR 3.5 hearing. These three detectives went

to the scene of the arrest of Mr. Hicks for unlawful delivery of a controlled substance to question him about the shooting. RP(3/8) 7-9, 26-27, 42. The officers chose not to advise Mr. Hicks of his Miranda warnings until after Mr. Hicks began asking questions and indicating a willingness to work with them. RP 8. Mr. Hicks allegedly asked if he was "through" and if the delivery was the only thing the detectives "got me on." RP(3/8) 28, 44. He expressed admiration that he was caught because he did not even "curb-serve." RP(3/8) 28. Mr. Hicks indicated that he knew all of the big drug dealers in town. RP(3/8) 28.

After Mr. Hicks read and signed a written waiver of rights, Detective Davidson told Mr. Hicks that he was being held for more than the deliveries and Mr. Hicks responded that he knew he was, but he did not do it and that his mom knew. RP(3/8) 11, 29-30, 47. Mr. Hicks expressed concern that his life would be in danger and expressed concern about the safety of his mother and sister. RP(3/8) 12, 30. Mr. Hick indicated that he was a thief but that he did not hurt people. RP(3/8) 12.

According to Davidson, at the elevator door at the police station, Mr. Hicks shook his hand and said "My sister is not going to die and I'll do life." RP(3/8) 31.

Once at the interview room, after Webb and Ringer had left to get Mr. Hicks something to drink and to talk about how to approach the

interview, Davidson came out and indicated that Mr. Hicks mentioned an attorney but did not specifically ask for one. RP(3/8) 13, 31-32, 48.

The detectives testified that they returned to the interview room and told Mr. Hicks that the interview would cease if he asked for an attorney and Mr. Hicks agreed that he was not asking for an attorney. RP(3/8) 14, 49. Mr. Hicks expressed concern that if he helped it might hinder his plea bargaining. RP(3/8) 14-15, 49. Mr. Hicks also indicated that he smoked a marijuana cigarette laced with PCP and after that he had very little recollection of events. RP(3/8) 21

After further questioning, Mr. Hicks decided he wanted to speak to an attorney and specified Mr. DeGeorge, who later represented him at his first trial. RP(3/8) 15-16. After Mr. DeGeorge was contacted by the police, Mr. Hicks invoked his right to remain silent. RP(3/8) 15-16, 50.

At booking, according to Detective Webb, Mr. Hicks continued to make statements and asked Webb if he knew what bullet killed "the girl." RP(3/8) 18. He said that he bet it was the .22; and when Webb asked him why, he responded that it was because he was the closest. RP(3/8) 18.

Mr. Hicks testified at the Cr 3.5 hearing that his questions initially concerned his drug arrest and his wanting to know what was going on after being placed in an unmarked car with the detectives. RP(3/8) 55-57. After being read his Miranda warnings, Mr. Hicks asked the detectives if they

had anything on him; and, when they got to the station, he asked for an attorney. RP(3/8) 57-58. After he asked to speak to Mr. DeGeorge, the detectives showed him crime scene pictures. RP(3/8) 60-61. Davidson told him that he needed to make a statement to help himself and he did make some incriminating statements. RP(3/8) 62

The prosecutor indicated that the trial court needed to decide about the admissibility of the pre-Miranda statements, the post-Miranda statements, the statements after the equivocal request for counsel and the statements at booking. RP(3/8) 74. Defense counsel asked the trial court to exclude the statements made after the request for counsel. RP(3/8() 82. Defense counsel further argued that the request for counsel was not equivocal. RP(3/8) 78.

The trial court denied suppression and entered written findings of fact and conclusions of law in support of its decision. CP 1-20.

Mr. Hicks's statements were introduced at both trials through the testimony of the three detectives. RP 696-710,1537-1538. Those statements included, in addition to those set out above, that Mr. Hicks said, before being read his Miranda warnings, "I'm not looking to go back to the pen," and "I'll work with you." RP(5/1) 113-115; RP 697. Once in the interview room, the detectives testified that Mr. Hicks said that he was a hostage and asked to be given a lie detector test; RP 703. RP(5/1) 147.

Mr. Hicks allegedly acknowledged that his fingerprints would be on the .22 even though the detectives knew they were not. RP(5/1) 148. The detectives testified that Mr. Hicks said that he feared for his life if he did not do what he was told and that he shot no one. RP(5/1) 140. Mr. Hicks agreed that someone said "give me your money or die," and that the other person told him that "this is for the hood," and that it was clear that the person wanted him to shoot, so he closed his eyes and fired. RP(5/1) 150-151; RP 706.

Over defense objection, the prosecutor was permitted to characterize Mr. Hick's statement as a confession. RP 1484.

6. Cross examination of unavailable witness

At the second trial, witness Wayne Washington, the nearby resident who described hearing the gunshots, was unavailable. Defense counsel objected to reading the transcript where the witness described the firing of the gun in response to the question, "was the gunfire pop,pop, pop, or pop, pop, pop, pop?" on the grounds that the written record could not duplicate the original. RP 1597, 17077-1708. The court denied the objection and permitted the state to read the prior testimony into the record including the portion where the witness testified about the spacing and sound of the shots and even where the testimony was elicited on cross examination. RP 1710-1711, 1727-1728. The court would not allow

defense counsel the right to exclude the prior cross examination. RP 1727-1728, 1761-1762.

7. Voir dire second trial

During the course of peremptory challenges, counsel objected to the state's challenge of juror No. 9, Sylvia Donovan, the only African American in the first two rows of prospective jurors and, since another juror had become ill, in the entire venire. RP 490. Counsel for Mr. Babbs described juror No. 9 as "middle aged, 40ish, 45ish -- [who] seems to be of appropriate intelligence" and noted that juror no. 9 had said little. RP 491. He noted further that there was nothing in her questionaire which could rise to a challenge. RP 495. Counsel for Mr. Hicks joined the Batson challenge. RP 492.

The trial court found that the defense had established a prima facie case. RP 496. The prosecutor's reasons were (1) that Ms. Donovan had a master's degree in education and her type tended to be "more forgiving" and "nurturing," (2) that she was a social worker, and (3) that somebody in her family or a friend had been arrested and served time. RP 496-497.

Based on this rationale by the prosecutor, the court denied the Batson challenge without considering whether the prosecutor's reasons were merely pretextual. RP 498.

During the course of voir dire, the state sucessfully challenged for cause juror No. 17, an African American, because he knew a number of the witnesses and he stated he was 90% sure that he could be open minded about their testimony. RP 123-142.

The state challenged juror No. 9 without challenging juror 14, whose brother had been in jail and served time and who had a high school friend who killed his wife, who was also the juror's friend.[5] RP 107-110. Juror No. 14 had also had a bad experience in an arbitration and associated the attorney for the other party with the prosecution. RP 112. This juror also described defense attorneys, in her questionnaire, as "fair, strong, wise." RP 113.

8. Juror contact second trial

During the course of the second trial, juror number 13 alerted the bailiff about an encounter he had with a person who he had seen with Jonathan Webber. RP 1588-1589. The juror reported that this person made a statement to him on the street when no one else was around that "something about this is messed up" and that juror 13 did not know if the person was trying to send him a message. RP 1590.

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[5] Defense counsel excused juror No. 14 as the defense's third challenge. SuppCP 135-136 (peremptory challenge sheet).

Based on this representation, defense counsel moved to excuse juror 13. RP 1590. Counsel indicated that he did not expect juror 13 to say that he could not be fair, but that it was troubling that Mr. Webber's associate would trail a juror and make comments about the case. RP 1591. Counsel stated that the matter was serious enough that the juror should be excused and that the court should not rely on the juror's own interpretation of the event. RP 1592.

Juror 13 was called into court and reported that as he was leaving he saw Mr. Webber with some people. RP 1601-1602. One of those people with whom he saw Mr. Webber and with whom he had seen Mr. Webber with in the courtroom earlier, came up beside him and turned the corner with him. RP 1603. There was no one else around, and although the person did not talk directly to juror 13, "he was F___ sometking or other, and he was -- he was within I'd estimate six to eight feet from me, closer to six feet. And there's no one else around. And he's -- I mean, I just got the feeling that he knew who I was and I knew who he was, but I didn't say a word." RP 1603. Juror 13 walked to the bus stop and noticed that the person stopped and, as the juror turned to look, he could see that the person opened the door to a car. RP 1603. Juror 13 repeated that the person obviously knew who he was and said "something like, what the [F]____ do you want me to [F]_____." RP 16-4. Juror 13 then stated

that he "wasn't intimidated by it" and that the encounter would not make it difficult for him to be fair and impartial. RP 1604. On further questioning, juror 13 indicated that it felt like more than a coincidence. RP 1605. The court concluded that it was satisfied hatt the juror could be fair and impartial. RP 1606.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT THE CASE WAS NOT A DEATH PENALTY CASE AND IF DEFENSE COUNSEL FAILED TO OBJECT TO THE INSTRUCTION, MR. HICKS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

After an unreported sidebar during voir dire at the first trial, the court instructed the jurors that the case was not a death penalty case. RP(4/22) 73-74. Because the sidebar was unreported, it is unclear whether defense counsel objected to the instruction. Whether or not counsel objected, it was error for the court to instruct the jury that the case was not a capital case. If defense counsel failed to object, he provided ineffective assistance of counsel. In either event, the error should require reversal of Mr. Hicks' conviction.

In State v. Townsend, 142 Wn.2d 838, 846, 15 P.3d 145 (2001), the Washington Supreme Court held that "considering the long-standing rule that no mention may be made of sentencing in noncapital cases we

conclude that counsel's failure to object to the instruction fell below prevailing professional norms." The Supreme Court, in Townsend, recognized that "overwhelming authority" supports the conclusion that the jury in a noncapital case may not be informed that the case is not a death penalty case. Townsend, 142 Wn.2d at 846. The Townsend court concluded that the "strict prohibition against informing the jury of sentencing considerations ensures impartial juries and prevents unfair influence of a jury's deliberations, "noting that "if jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility." Townsend, at 846 (citing Shannon v. United States, 512 U.S. 573, 579, 114 S. Ct. 2419, 129 L. Ed. 2d 459 (1994); Rogers v. United States, 422 U.S. 35, 40, 95 S. Ct. 2091, 45 L. Ed.2d 1 (1975)).

In State v. Murphy, 86 Wn. App. 667, 937 P.2d 1173 (1997), review denied, 134 Wn.2d 1002(1998), the court similarly held that it was error to instruct the jury that the case did not involve the death penalty.

Here, in spite of this clear and well-settled authority, the trial court decided to instruct the prospective jurors that the case was not a death penalty case. This was clearly erroneous.

Because the sidebar with counsel before instructing the jury was unreported, it cannot be determined from the record whether trial counsel objected to the giving of the instruction. If counsel did not object, however, the failure to object constituted ineffective assistance of counsel under the state and federal constitutions. In Townsend, the court held that "[t]here was no possible advantage to be gained by defense counsel's failures to object to the comments regarding the death penalty. On the contrary, such instruction, if anything, would only increase the likelihood of a juror convicting the petitioner." Townsend, 142 Wn.2d at 847. Thus the Townsend court conlcuded that the failure to object constituted deficient performance.

While the court in Townsend concluded that the error was harmless, in light of the overwhelming evidence of premeditation in the case, the error cannot be deemed harmless here.

Here, the jurors determined that Mr. Hicks lacked the capacity to premeditate and acquitted him of first degree premeditated murder. The jurors, however, were unable to reach a unanimous verdict on the count of attempted murder. Thus, the jurors may well have been less deliberative and less willing to hold out for a lesser degree in the murder charge or for an acquittal on the attempted first degree murder count because they knew that the death penalty was not involved. Townsend, 142 Wn.2d at 846.

The jurors, having determined that Mr. Hicks did not premeditate in Count I, may well have settled for felony murder alternative without fully considering the lesser included offenses. Jurors might have acquitted Mr. Hicks in Count II if it had been more deliberative. Some jurors may have been less likely to hold out on either count because they had been instructed that he could not receive a death sentence. The error was not harmless and, in fact, Mr. Hicks may have been irreparably harmed by the jury's unwillingness to deliberate to a possible acquittal on the attempted murder count. Given that they apparently agreed that he lacked the capacity to premeditate the death of Chica Webber, they very likely could have found that he lacked the capacity of premediate the death of Jonathan Webber and acquitted him of that charge. At the least, the erroneous instruction should result in reversal of Mr. Hicks' conviction for felony murder in Count I.

2. THE TRIAL COURT ERRED IN DENYING MR. HICKS' MOTION TO SUPPRESS HIS CUSTODIAL STATEMENTS.

The trial court erred in denying Mr. Hicks' motion to suppress his custodial statements.

a. Pre-Miranda statements

Mr. Hicks' pre-Miranda statements should have been suppressed because Mr. Hicks was in custody and because the act of having three homicide detectives arrive at the scene of his drug arrest and take him away

in an unmarked car signaled so clearly that the detectives thought he was involved in some other more serious matter that it was entirely predictable that he would be concerned and likely to ask questions and make statements to try to clarify his position. In fact, Detective Ringer testified that he was taking notes before warnings were given. RP(3/8) 27.

There was absolutely no reason why Mr. Hicks should not have been given his Miranda warnings, and the failure to advise Mr. Hicks of his right to counsel at the time he was placed in the detectives' car violated his clear and well-established right under CrR 3.1(c)(1) to be immediately advised of his right to an attorney. CrR 3.1(c) goes beyond the requirements of Miranda and requires that the police advised an arrested person immediately of the right to counsel. State v. Dunn, 108 Wn. App. 490, 494, 29 P.3d 789 (2001). While Mr. Hicks' attorney did not move to suppress for violation of CrR 3.1(c), the rule is still relevant to establish that the detectives were acting in violation of a well-known, unambiguous requirement of the law in not advising Mr. Hicks at the time they took him into their custody. Further, although the detectives testified that they did not intend to question Mr. Hicks, only to drive him to the police station to be interviewed, this is not credible. RP(3/8) 8. If transport were the only purpose, a uniformed officer could have transported Mr. Hicks. Certainly three senior detectives were unnecessary for mere transportation.

The detectives intended that the fact of custody in a car with all three of them, which was not likely a mere drug arrest, would create a coercive atmosphere which would result in an incriminating response. This is the very situation Miranda is designed to alleviate.

The state may not use custodial statements of a defendant at trial absent proof that the defendant's privilege against self-incrimination was adequately protected by the warnings set out in Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A. L. R. 3d 974 (1966). State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988). Custodial statements made without proper Miranda warnings are presumed to be involuntary. Sargent, 111 Wn.2d at 647-648.

A statement is custodial for purposes of Miranda, not only when there has been an arrest, but whenever a person's freedom of movement is significantly restrained. United States v. Berkemer, 468 U.S. 420, 441, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984) (a person may be in "custody" for purposes of Miranda before he is arrested); Miranda, 384 U.S. at 444 (warnings must be given whenever a person has been deprived of his freedom of action in any significant way).

Here, it is undisputed that Mr. Hicks was in custody. He was also subject to interrogation for purposes of his Fifth Amendment privilege against self incrimination. "Interrogation" includes "not only express

questioning, but also any other words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980).

> [T]he term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

Rhode Island v. Innis, 446 U.S. at 301; State v. Willis, 64 Wn. App. 634, 637, 825 P.2d 357 (1992).

Here, if one focuses on the perceptions of Mr. Hicks, who had had experience with the police before this arrest, it is clear that he would understand that something was at stake beyond an arrest for selling drugs and that he would try to clarify his situation and determine why these three detectives had taken him into their custody. The detectives arranged these circumstances and failed to immediately advise him of his rights in spite of their clear constitutional duty and duty under CrR 3.1. Therefore, the statements Mr. Hicks made to the detectives before being read his Miranda rights should have been suppressed.

b. Post-Miranda statements

Failure to give Miranda warnings and obtain a waiver before obtaining custodial statements requires exclusion of any statements obtained, even those made after belated warnings are given. Missouri v. Seibert, ____ U.S. ____, 124 S. Ct. 2601, 2605, 159 L. Ed. 2d 643 (2004). The Seibert Court expressly interpreted Oregon v. Elstad 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985), which held that a second statement could be taken after an initial unwarned statement, to be limited to instances in which the first statement is brief, made in a good faith neglect of Miranda in a non-coercive atmosphere and the second statement is in a markedly different setting. Seibert, 124 S. Ct. at 2611-2612. In contrast, where the custodial session is one continuum, the belated Miranda warnings are too late. Seibert, at 2613.

Accordingly all of Mr. Hicks' statements after he was taken into custody by the detectives should have been suppressed.

c. After request for an attorney

Even if all of Mr. Hicks's post-Miranda statements are not suppressed, Mr. Hicks' statements after he requested an attorney and was further questioned should be suppressed. Whether or not Mr. Hicks' initial request for counsel was equivocal, at some point he asserted his right to counsel. CP 10-20 (Conclusions as to Disputed Facts No. 7, "At

approximately 1600 hours . . . defendant asked to have his attorney, Rodney DeGeorge present during further questioning"). Although attorney DeGeorge was called by the detectives, Mr. Hicks was never given the opportunity to consult with him or have him present during further questioning, including Detective Webb's questioning of him during booking. Therfore, at the least, Mr. Hicks' alleged statement to Webb, in response to Webb's question about why Mr. Hicks believed that a .22 bullet killed Ms. Webber -- that he was the closest to her -- should be suppressed. Even if Mr. Hicks reinitiated contact, he never waived his rights and in fact repeated to Webb that he had invoked them. RP(3/8) 18; RP(5/6) 81-82; RP 1537-1538.

"If the individual [being interrogated] indicates in any manner, at any time prior to or during questioning that he . . . wants an attorney, the interrogation must cease." Miranda, 384 U.S. at 473-474. A waiver of the right to counsel, once asserted, is valid only if the invocation of that right is scrupulously honored by the police, further interrogation is initiated by the police, and the defendant makes a knowing and voluntary waiver of the asserted right. Edwards v. Arizona, 451 U.S. 477, 484-485, 68 L. Ed. 2d 378, 101 S. Ct. 1880 (1981); State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982). In determining whether the right was voluntarily waived, the courts must indulge every reasonable presumption against waiver of

a constitutional right. Brewer v. Williams, 430 U.S. 387, 404, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1997).

Here, even assuming that the detectives scrupulously honored Mr. Hicks' assertion of his right to counsel and that Mr. Hicks reinitiated contact, Mr. Hicks' response to a question from Webb was not admissible. Mr. Hicks never made a knowing and voluntary waiver of the right to counsel and therefore any further questioning was improper. Since Mr. Hicks' alleged statement to Webb was probably the most inculpatory statement that he made, even if this is the only statement deemed to be erroneously admitted at trial, its admission requires reversal of Mr. Hicks's convictions.

3. THE TRIAL COURT ERRED IN DENYING MR. HICKS' BATSON CHALLENGE.

The state exercised its second peremptory challenge to excuse juror no. 9, the only African-American prospective juror remaining in the panel. RP 490. The state had previously challenged another African American juror, juror no. 17, because he knew a number of the witnesses. RP 123-142.

The defense objected to the state's excusing the only remaining African-American juror, and the trial court found that his challenge made a prima facie case for a Batson challenge. RP 496. The state's only

proffered reasons for excusing the juror were that she had a master's degree in education, which might make her more forgiving, that she was a social worker, and that someone in her family or a friend had been arrested and served time. RP 496-497. The state had not challenged or excused juror no. 14, a juror whose brother had been in jail and served a sentence and who had a high school friend who killed his wife; the victim was also the juror's friend. RP 110. Further juror no. 14 had associated opposing counsel in an arbitration with the prosecution and had also described defense attorneys as "fair, strong, wise." RP 113.

Mr. Hicks is African-American and the most obvious reason for wanting to excuse juror no. 9, the only African American available to serve as a juror on his case, was because of her race. Thus, even if the prosecutor's reasons are deemed race-neutral, the reasons are pretexual and, under Batson, require reversal of Mr. Hicks' conviction for attempted first degree muder. Moreover, since the trial court did not consider whether the prosecutor's reasons were pretextual, no deference need by paid to the trial court's findings.

Each party at trial generally has the right to exercise peremptory challenges against potential jurors without giving a reason. RCW 4.44.140; CrR 6.4(e)(1). But under the equal protection clauses of the federal and state constitutions, a peremptory challenge "may not be exercised to

invidiously discriminate against a person because of gender, race, or ethnicity." State v. Evan, 100 Wn. App. 757, 763, 998 P.2d 373 (2000); Batson v. Kentucky, supra. "Race-based peremptory challenges violate both a defendant's equal protection right not to have members of his or her own race excluded from the jury on account of race and the equal protection rights of the excluded jurors who are denied a significant opportunity to participate in civic life." State v. Rhodes, 82 Wn. App. 192, 195, 917 P.2d 149 (1996). The discriminatory use of a peremptory challenge is structural error which is not amenable to harmless error analysis. United States v. Annigoni, 96 F.3d 1132 (9th cir. 1996).

The Supreme Court, in Batson, articulated a three-step inquiry for determining whether a peremptory challenge was a product of racial discrimination. The first step requires the defense to make a prima facie showing that the state exercised its challenges on the basis of race. Hernandez v. New York, 500 U.S. 352, 358, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991); Rhodes, 82 Wn. App. at 196. Once a prima facie showing is made, the burden shifts to the state to articulate a race-neutral explanation for its challenges. Hernandez, 500 U.S. at 358-359. If the state is able to articulate a race-neutral justification, step three requires the trial court to determine whether the state's explanation is a pretext. Hernandez, at 359.

The defendant's intitial burden of establishing a prima facie case of racial discrimination is two-pronged: (1) he must "first show that the peremptory challenge was exercised against a member of a constitutionally cognizable group," and (2) he must "show that the . . . peremptory challenge" and "other relevant circumstances raise an inference of discrimination." State v. Wright, 78 Wn. App. 93, 99, 896 P.2d 713 (1995) (quoting State v. Sanchez, 72 Wn. App. 821, 825, 867 P.2d 638 (1994)).

On appeal, if the trial court has found that the defense made a prima facie showing of discrimination and ruled on the reasons provided by the state, the question of the sufficiency of the prima facie case is no longer relevant:

> Once a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant has made a prima facie showing becomes moot.

Hernandez, 500 U.S. at 359 (citing United States Postal Service Bd. of Governors v. Aiken, 460 U.S. 711, 715, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983) ("[W]here the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant").

Since the trial court in this case found, after the peremptory challenge of Juror No. 9, that the defense had established a prima facie case under Batson, the sufficiency of the prima facie case is no longer an issue. The issue is whether the state provided race-neutral reasons and whether those reasons were a pretext.

In assessing the race-neutrality of the prosecutor's explanation, the courts "must determine whether, assuming the proffered reasons for the peremptory challenges are true, the challenges violate the Equal Protection Clause as a matter of law." Hernandez, 5005 U.S. at 359. At this step, the proponent must provide a legitimate reason for its actions, but the reason need not be persuasive to the court; the court will determine that the reason is race-neutral unless there is a discriminatory intent inherent in the reason. State v. Vreen, 143 Wn.2d 923, 927, 26 P.2d 236 (2001).

In the third step of a Batson challenge, the trial court has "the duty to determine whether the defendant has established purposeful discrimination." Batson, 476 U.S. at 98. The court must evaluate the "persuasiveness" of the prosecutor's proffered reasons. Purkett v. Elem, 514 U.S. 765, 768, 131 L. Ed. 2d 834, 115 S. Ct. 1769 (1995). "[I]f a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination." Lewis v. Lewis, 321 F.3d 824, 830 (9th Cir. 2003);

United States v. Chinchilla, 874 F.2d 695, 698-699 (9th Cir. 1989) (holding that although reasons given by a prosecutor "would normally be adequate 'neutral' explanations taken at face value, the fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against their sufficiency"); Johnson v. Vasquez, 3 F.3d 1327, 1331 (9th cir. 1993) ("When there is reason to believe that there is a racial motivation for the challenge, we are not bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it").

Even if the prosecutor's explanation for excusing juror No.9 is deemed to be racially neutral, it cannot meet the third step of the Batson test; the state's reasons are pretextual. Moreover, the trial court failed to consider or make the necessary determination to meet the third step. This too was error. Jordan v. Lefevre, 206 F.3d 196, 200 (2nd Cir. 2000) ("error for trial court to deny a Batson motion without explicity adjudicating the credibility of the non-moving or challenging party's race neutral explanations for its action in peremptorily striking potential jurors").

What undermines the reasons given by the prosecutor as racially neutral is that the prosecutor did not seek to excuse a non-African-American juror who had even closer ties to someone who had served a sentence and who had generally an unfavorable opinion of prosecutors and a generous view of defense counsel. The non-African-American juror who was not

challenged associated the prosecutor with an attorney who opposed her in an arbitration and who viewed defense attorneys as "fair, strong, wise." These later views were specifically articulated and stronger than the theoretical, stereotypical view that educators and social workers are "nurturing." Further, the trial court did not undertake the third step required by Batson and therefore the record does not support the trial court's denial of the Batson challenge. Mr. Hicks' conviction should be reversed and his case remanded for retrial on the attempted first degree murder charge.

4. THE TRIAL COURT ERRED IN ADMITTING HEARSAY EVIDENCE THAT PIERCE COUNTY JAIL STAFF TREAT INMATES WITH ANTIPYSCHOTIC MEDICATION JUST TO CONTROL THEIR BEHAVIOR.

The central trial issue was whether Mr. Hicks lacked the capacity to premeditate or intend to take the life of Chica and Jonathan Webber. His defense was diminished capacity and one aspect of that defense was that he had been prescribed medication, over an extended period of time, which was appropriate only for those suffering from schizophrenia or other psychosis. RP(5/7) 69-70; RP 1286-1287. The state sought to rebut this evidence through hearsay evidence that the Pierce County Jail regularly prescribed antipsychotic medication as a means of controlling inmate behavior. At the first trial, the state elicited this hearsay evidence from

Dr. Hart in its rebuttal case and argued the importance of the evidence during oral argument. RP(5/8) 110; RP(5/12) 163. On retrial, with different counsel, Mr. Hicks objected to the testimony and the trial court erred in overuling the objection and permitting Mr. Hart to testify that the medical staff at the Pierce County Jail used Seroquel to control behavior. RP 2026-2027.

The testimony was clearly hearsay. It was also testimonial hearsay and, since the declarant was unavailable in court, constitutional error as well under the state and federal constitutions. The testimony was hearsay because Dr. Hart had no first hand knowledge of why drugs were prescribed in the Pierce County Jail and his knowledge was based entirely on the out-of-court reports and statements of the medical staff of the jail to him. None of the jail medical staff testified at trial.

The error in admitting the testimony was not harmless as an evidentiary issue. It may well have improperly undermined Mr. Hicks' defense. The testimony not only was elicited to establish that Mr. Hicks was not suffering from a serious mental illness or psychosis, it was elicited to establish that he was disruptive to the degree that he had to be medicated to control his improper behavior. The prosecutor relied on the testimony in closing argument in both the first and the second trials. RP(5/12) 163, RP 2181.

The error should also be deemed a constitutional error because jail personnel speaking with doctors who evaluate for the state persons with mental defenses might reasonably expect that their statements would be used in court. Indeed, in this case, the declarant should have been called as a witness and subject to cross examination if that person had relevant information about Mr. Hicks' medication. As testimonial hearsay, the admission of the hearsay violated Mr. Hicks' state and federal constitutional rights to confront and cross examine the witnesses against him. Jail medical staff deal entirely with persons accused of crimes and their discussions with other potential state's witnesses should be considered testimonial hearsay.

The phrasing of testimony to eliminate a direct quote is inadmissible "backdoor" hearsay. State v. Martinez, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001). As the Martinez court held, a hearsay problem is not eliminated by asking questions so as to avoid direct quote: "Inadmissible evidence is not made admissible by allowing the substance of a testifying witness's evidence to incorporate out-of-court statements by a declarant who does not testify." Martinez, 105 Wn. App. at 782.

Dr. Hart's testimony that medical staff medicate with antipsychotic drugs was admittedly based on conversations with jail medical staff. It was hearsay even if not a direct quote. It was also testimonial hearsay, given

that Dr. Hart's conversation likely arose in the context of a case and likely arose in this particular case. RP 1948, 2025.

In Crawford v. Washington, 541 U.S. ____, 124 S. Ct. 1354 (2004), the United States Supreme Court held that "[w]here testimonal statements are at issue, the only indicium of reliability sufficient to satisfy the constitutional demands is the one the Constitution actually prescribes: confrontation." The Court defined "testimonial statements" to include "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Crawford, 124 S. Ct. at 1364 (quoting NACDL Amicus Brief). In Crawford, the testimonial hearsay involved a statement to the police. The statements here were similarly to a person likely to testify at a criminal trial.

The admission of the hearsay testimony that Pierce County Jail medical staff medicate inmates with antipsychotic medication to control their behavior was error and constitutional error. The error was not harmless beyond a reasonable doubt and should require reversal of Mr. Hicks's conviction. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Mr. Hicks' conviction for attempted first degree murder should be reversed and his case remanded for retrial.

5. THE TRIAL COURT ERRED IN FAILING TO EXCUSE THE JUROR WHO WAS CONTACTED BY A FRIEND OF THE COMPLAINING WITNESS.

During the course of the second trial juror no. 13 reported that he had been followed to the bus stop, after leaving the courthouse, by a person whom he had seen inside and outside the courtroom with the victim, Jonathan Webber. RP 1588-1589, 1601-1603. Juror no. 13 felt certain that the person who followed and mumbled something obscene and vaguely threatening (like "what the F--- do you want me to ____") to him and knew he was a juror. RP 1603. This person was closer than six feet to him and there was no one else around. RP 1603. Although juror 13 stated several times, without being asked, that he was not intimidated, it was clear that juror 13 understood that he was meant to feel intimidated. RP 1604. Under these circumstances, the trial court erred in failing to excuse juror 13. The contact was presumptively prejudicial and not shown to be harmless beyond a reasonable doubt.

The Sixth Amendment and Const. art. 1, § 22 guarantee to criminal defendants the right to a trial by a fair and impartial jury. Unauthorized contact between jurors and third parties compromises this right to an impartial jury trial and is presumptively prejudicial. Remmer v. United States, 347 U.S. 227, 229, 98 L. Ed. 2d 654, 74 S. Ct. 450 (1954); Mattox v. United States, 146 U.S. 140, 150, 36 L. Ed. 2d 917, 13 S. Ct. 50

(1892) ("[p]rivate communications, between jurors and third persons. . . invalidate the verdict unless their harmlessness is made to appear"); State v. Murphy, 44 Wn. App. 290, 296, 721 P.2d 30, review denied, 107 Wn.2d 1002 (1986).

Once the improper contact has been established, the contact gives rise to a presumption of prejudice which the state bears the burden of disproving beyond a reasonable doubt. Murphy, 44 Wn. App. at 296 (citing Remmer v. United States, supra, and State v. Rose, 43 Wn.2d 553, 557, 262 P.2d 194 (1953)). The presumption is overcome only where the trial court determines the contact was harmless beyond a reasonable doubt. Murphy, at 296; State v. Brenner, 53 Wn. App. 367, 372, 786 P.2d 509 (1989); State v. Saraceno, 23 Wn. App. 473, 596 P.2d 297 (1979).

This contact was presumptively prejudicial and was not shown to be harmless beyond a reasonable doubt. Mr. Hicks' conviction for attempted first degree murder should therefore be reversed.

6. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO USE PRIOR RECORDED CROSS EXAMINATION OVER DEFENSE OBJECTION.

At the second trial defense counsel objected to the introduction of the former testimony of Wayne Washington, a nearby resident who described hearing the gunshots. RP 1597. The defense objected to the portion of the transcript in which Mr. Washington described the pacing of

the shots with the words "pop, pop, pop, pop " as opposed to "pop, pop, pop." RP 1597. As counsel argued, the relevant distinction could not be made by a reader of the transcript. RP 1710-1711, 1727-1728. Since the testimony was elicited on cross examination, defense counsel further argued that he should be free, as new counsel, to conduct cross examination in a different manner or forego cross examination altogether. RP 1761-1762. The trial court erred in permitting the state to elicit the testimony.

Although ER 804(b)(1) permits the use of the former testimony of an unavailable witness, see e.g., State v. Hobson, 61 Wn. App. 330, 810 P.2d 70 (1991), that rule should not be held to permit the state to introduce cross examination from a former trial and should not allow the state to introduce testimony which could not duplicate the original testimony.

Where the very purpose of the original testimony is to convey to the jurors something that the mere words on a page cannot convey -- here the space between the shots -- the former testimony is misleading at best and should not be admitted. Particularly where the evidence was elicited on cross examination in the earlier trial, the state should have no interest in introducing unreliable and potentially misleading former testimony.

The state argued in closing that the death of Chica Webber was premeditated, because Mr. Hicks allegedly shot her a second time after she had fallen to the ground. RP 2088. Since the witness's testimony about

the speed with which the shots were fired from the .22 caliber revolver could not be accurately reproduced, it was reversible error to permit the state to introduce the misleading testimony on this important point.

7. CUMULATIVE ERROR DENIED MR. HICKS FAIR TRIALS.

The combined effects of error may require a new trial, even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the federal and state constitutions. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Frederick, 78 F.3d 1370, 1381 (9th Cir. 1996); United States v. Troy, 52 F.3d 207, 211 (9th Cir. 1995); United States v. Pearson, 746 F.2d 789, 796 (11th Cir. 1984).

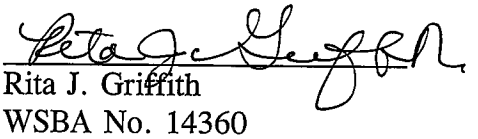
In this case all of the errors combined to enhance the unfair prejudice to Mr. Hicks, and his conviction should be reversed even if the errors individually would not require reversal. The juror issues, the erroneous admission of Mr. Hicks' custodial statements, and the improper hearsay evidence each alone and together require reversal of both of Mr. Hicks' convictions and a remand for retrial.

E. CONCLUSION

Appellant's convictions should be reversed and his case remanded for retrial.

DATED this 1st day of November, 2004.

Respectfully submitted,



Rita J. Griffith
WSBA No. 14360
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 1st day of November, 2004, I caused a true and correct copy of Opening Brief of Appellant to be served on the following via prepaid first class mail:

Counsel for the Respondent:
Kathleen Proctor
Office of Prosecuting Attorney
930 Tacoma Ave. S., Rm. 946
Tacoma, Washington 98402-2171

Phillip Hicks
793210
Washington State Penitentiary
1313 N. 13th Avenu7e
Walla Walla, WA 99362

and by e-mail to:

Robert Quillian
Attorneynat Law
2633 Parkmount Ln. SW, Ste A
Olympia, WA 98502-5793

Rita J. Griffith 11/1/04
Rita J. Griffith DATE at Seattle, WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. PHILLIP VICTOR HICKS, Defendant.	CAUSE NO. 01-1-02238-7 FINDINGS OF FACT AND CONCLUSIONS OF LAW ADMISSIBILITY OF STATEMENT, CrR 3.5

This matter having come on for hearing before the honorable JUDGE THOMAS FELNAGLE on the 8TH day of MARCH, 2002, and the court having ruled orally that the statements of the defendant are admissible, now, therefore, the court sets forth the following Findings of Fact and Conclusions of Law as to admissibility.

UNDISPUTED FACTS

1. On April 24, 2001, defendant, Phillip Hicks, was arrested for unlawful delivery of a controlled substance.

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

2. Shortly thereafter, Hicks was contacted by Detectives J. Ringer, T. Davidson, and W. Webb of the Tacoma Police Department.

3. Hicks was placed in the backseat of an unmarked patrol vehicle.

4. As soon as the detectives entered the patrol vehicle, without being questioned, Hicks began saying, "I'll work with you." He said, "Tell the truth, answer one question. Am I through?" The detectives did not engage in a conversation with the defendant.

5. It was the intent of the detectives to transport Hicks to the police station before questioning.

6. Hicks, however, wanted to know how he had been discovered and if he had been followed. Defendant asked, "Are deliveries the only thing you got on me?" He further stated, "I'm not trying to go back to the pen." Defendant questioned whether he had sold to an undercover officer. He then stated, "You mother fuckers are good to catch me. I don't even curb serve." The detectives did not respond.

7. As the defendant expressed a willingness to talk and was very talkative, Detective Webb stopped the patrol vehicle alongside the road.

8. Detective Davidson who was seated next to the defendant advised Hicks of his Miranda rights from an Advisement of Rights Form.

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930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

9. Hicks was advised of his rights at 1348 hours.

10. Hicks signed the Advisement of Rights Form, acknowledging that he understood his rights.

11. Hicks waived his rights and expressed a willingness to answer questions. Defendant stated, "I don't hurt people. I'm a thief."

12. Hicks was transported to the Criminal Investigation Division of the Tacoma Police Department. At the police station, in front of the freight elevator, Hicks reached for Detective Davidson's hand and shook it.

14. Hicks congratulated Detective Davidson, stating, "My sister is not going to die, and I'll do life."

15. Hicks was taken into an interview room.

16. Hicks was asked if he wanted something to drink, and at defendant's request, Detective Ringer left the room to get a bottle of orange juice.

17. Hicks made an equivocal request for an attorney.

18. Detectives Ringer, Webb, and Davidson discussed the equivocal request for an attorney amongst themselves outside the interview room.

19. They, thereafter, re-entered the interview room, and Detective

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930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

Davidson reminded the defendant that he had been advised of his rights. Hicks replied, "Yes."

20. Detective Davidson asked Hicks if he had knowingly waived his rights, and Hicks responded that he had.

21. Defendant wanted assurances that anything he said would help him get time off any potential sentence.

22. Detective Davidson told Hicks that they, the detectives, could not make any promises to him other than to inform the prosecutor's office of his cooperation.

23. After Hicks made statements to the detectives, he was transported to the Pierce County Jail by Detective Webb.

24. While waiting to be booked, Hicks was told to sit on a bench in the reception area of the jail.

25. Hicks continued to get up and walk over to Detective Webb.

26. Hicks continued to make statements about the homicide.

27. Detective Webb repeatedly reminded Hicks of his invocation of Miranda rights. Hicks responded, "I've already invoked my rights so you can't use things I say now."

28. Detective Webb again advised Hicks to sit down and to remain silent. Hicks, however, insisted on talking about the homicide.

Office of Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

DISPUTED FACTS

1. Detectives testified that after Hicks was advised of his Miranda rights and while still in the patrol vehicle, defendant was told by Detective Davidson that he was in more trouble than just delivering drugs. Defendant responded by exhibiting a "knowing look", stating, "I was there, but I didn't do it." When Detective Davidson told Hicks that he was involved in a murder, defendant expressed an exaggerated confused look, stating, "You know that I know what happened." Hicks, on the other hand, testified that nothing regarding the homicide was mentioned until they arrived at the police station. Defendant testified that the only topic discussed in the vehicle was the drug deliveries.

2. Detectives testified that while Detectives Ringer and Webb were out of the interview room and as Detective Davidson was about to leave the room, Hicks stated, "Maybe I need a lawyer." Defendant, however, testified that all three detectives were in the room when he stated, "I think I need a lawyer." The detectives then all left the room.

3. Detectives testified that when they re-entered the interview room, Detective Davidson questioned Hicks about his equivocal request

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930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
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for an attorney. Detective Davidson testified that he asked Hicks if he was requesting an attorney. Defendant, however, testified that he could not recall being asked by Detective Davidson whether he was asking for an attorney.

4. Detective Davidson reminded Hicks that he, Hicks, had mentioned an attorney and that if he was asking for an attorney, the detectives would end any questioning of him at that time. Detectives testified that Hicks told the detectives he was not asking for an attorney but was concerned about protecting his interest in "any potential deal" if he helped the detectives by answering questions. Defendant testified that he does not recall telling the detectives he was not asking for an attorney, but does recall talking to the detectives about protecting any potential deal if he helped by answering questions.

5. Detectives testified that Detective Davidson again asked if he, Hicks, wanted an attorney present. Detectives testified that Hicks did not wish to have an attorney present and that Hicks expressed a desire to speak with the detectives. Defendant, however, testified that he could not recall being asked by Detective Davidson if he wanted an attorney present.

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5. Defendant testified that when the detectives re-entered the interview room, Detective Davidson asked for a name of an attorney and that he, Hicks, gave the name of Rodney Degeorge. Detective Davidson then left the room to contact Degeorge. The detectives, on the other hand, testified that Hicks did not ask to have his attorney, Degeorge, present for further questioning until 1600 hours, after the defendant had given a statement about the homicide in question. When Hicks asked to have Degeorge present, Hicks never stated that he did not want to answer any more questions. Rather, Hicks hinted that he would give a more complete statement when Degeorge arrived.

6. Defendant testified that after Detective Davidson left the room, Detectives Ringer and Webb continued questioning him. They threw photos on the table telling him to look at the photos. Detectives Ringer and Webb testified, however, that they did not question the defendant while Detective Davidson was out of the room.

7. Defendant testified that after Detective Davidson spoke with Degeorge and he returned to the interview room, he told Hicks, "You need to help yourself." Defendant was led to believe by Detective Davidson that Degeorge had advised him to speak with the detectives and had advised that it was in his best interest to do so. The

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detectives, however, testified that they did not question Hicks while they waited for Degeorge to make contact. Detective Davidson testified that when he spoke with Degeorge, Degeorge told him to advise Hicks not to speak with the detectives.

CONCLUSIONS AS TO DISPUTED FACTS

1. After Hicks was advised of his Miranda rights, defendant was told by Detective Davidson that he was in more trouble than just delivering drugs. Defendant was told by Detective Davidson that he was involved in a murder.

2. While Detectives Ringer and Webb were out of the interview room and as Detective Davidson was about to leave the room, defendant made an equivocal request for an attorney. Defendant stated, "Maybe I need a lawyer."

3. When the detectives re-entered the room, defendant was questioned about his equivocal request for an attorney. Defendant was reminded by Detective Davidson that he, Hicks, had mentioned an attorney and that if he was asking for an attorney, the detectives would end any questioning of him at that time.

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4. Thereafter, when Hicks was asked if he was requesting an attorney by Detective Davidson, Hicks responded that he was not asking for an attorney. Hicks did express his concern about protecting his interest in any "deal" for helping the detectives.

5. Hicks was again asked by Detective Davidson if he wished to have an attorney present. Hicks again replied that he did not wish to have an attorney present.

6. Hicks clearly expressed his willingness to speak to the detectives.

7. At approximately 1600 hours, after the defendant made statements to the detectives regarding the homicide, defendant asked to have his attorney, Rodney Degeorge present during further questioning.

8. Detective Davidson left the room to contact Degeorge.

9. While Detective Davidson was out of the room, Detectives Ringer and Webb did not question Hicks.

10. After Detective Davidson returned, they waited for over an hour for Degeorge to contact the detectives.

11. While waiting, the detectives did not question Hicks.

12. After speaking with Degeorge, Detective Davidson told Hicks that he, the defendant, was advised not to speak with the detectives.

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13. Credibility is resolved in favor of the police. The detectives were consistent in their testimonies, and showed confidence in their statements. They had also prepared reports detailing the statements made by the defendant. Defendant's demeanor, on the other hand, showed that he did not have a good memory of the encounter with the detectives and it appeared as though the defendant was making it up as he went along. Further, defendant was not consistent in his testimony, and his version of the events was not credible.

CONCLUSIONS AS TO ADMISSIBILITY

1. Statements by the defendant in the patrol vehicle prior to being advised of Miranda are admissible as the statements were unsolicited by the detectives and not pursuant to an "interrogation" for purposes of Miranda.

2. Statements by the defendant in the patrol vehicle after being advised of Miranda are admissible as the statements were made after the defendant made a knowing, intelligent, and voluntary waiver of rights.

3. Statements by the defendant after the equivocal request for an attorney are admissible as the questioning after the equivocal

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invocation was limited to clarifying the request and as the defendant made a clear willingness to speak to the detectives without an attorney being present.

4. Statements by the defendant at the jail during the booking process are admissible as the statements were unsolicited by detective Webb and as defendant's belief that his statements could not be used against him because he had invoked his right to remain silent is unfounded and erroneous.

DONE IN OPEN COURT this 17th day of ~~April~~ May, 2002.

~~VAN DOORNINCK, JUDGE~~
Zebroski

FILED
DEPT. 15
IN OPEN COURT
MAY 17 2002
Pierce County Clerk
By _____ Deputy

Presented by:

~~SUNNI~~ Y. KO
Deputy Prosecuting Attorney
WSB # 20425

Approved as to Form:

~~ROBERT DEPAN~~ Rodney DeGeorge
Attorney for Defendant
7097

FINDINGS OF FACT AND
CONCLUSIONS, CrR 3.5 - 11